

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal by Stephen L. Quade of the Department of Natural Resources' Limited Permit #95-1102 to Construct Three Wildlife Ponds in Wetland 29-320W, Hubbard County, Minnesota.

ORDER DENYING APPLICANT'S
MOTION FOR RECONSIDERATION

Cross-motions for summary disposition were filed by Steven L. Quade (hereinafter "Applicant") and the Department of Natural Resources (hereinafter the "Department") regarding jurisdictional and constitutional issues regarding the denial of Applicant's permit application to construct a roadway. The motions were resolved by an Order, dated March 14, 1996, which granted the Department's motion for partial summary disposition on the jurisdiction of the Department and denied the Applicant's motion for summary disposition on the basis that the project site, being adjacent to a judicial ditch, conferred no constitutional right to construct a road in a protected public waters wetland.

On April 11, 1996, Applicant moved for reconsideration of the Judge's March 14, 1996 Order. The Department responded with a brief on April 18, 1996. Oral argument was held on May 8, 1996. The record closed on this motion on May 10, 1996, when Applicant submitted additional evidence from the Hubbard County Auditor and Hubbard County Recorder.

The Department is represented by Assistant Attorney General David P. Iverson, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127. Applicant is represented by Gerald T. Carroll, Carroll & Leighton, 100 South Fifth Street, Suite 2250, Minneapolis, Minnesota 55402-1221.

Based on all of the files and proceedings herein, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

That the Applicant's motion for reconsideration be DENIED.

Dated this ____ day of June, 1996.

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Applicant has raised four issues that are asserted to require reconsideration of the earlier Partial Summary Disposition Order in the matter. First, Applicant asserts that recent statutory changes passed by the 1996 legislature have a bearing on this matter. Secondly, Applicant believes that a case involving McLeod County (McLeod County Ditch No. 8 v. State of Minnesota, Department of Natural Resources. No. C5-95-2024), now pending before the Minnesota Court of Appeals, which deals with the rights of a landowner adjacent to a judicial ditch, may have a bearing on Applicant's case. Thirdly, Applicant has evidence that neither the Hubbard County Auditor nor the Hubbard County Recorder can locate either the 1984 Judgment from the Hubbard County Hearings Unit, or the public waters inventory from the following year. Lastly, Applicant asserts that the ordinary high water level (OHWL) of the subject public waters wetland is below the ground level of the proposed project site, and therefore, the Department lacks jurisdiction.

The recently amended statute referred to by Applicant is Minn. Stat. §§ 103G.221-2373 (the Minnesota Wetlands Conservation Act or "WCA"). The amendments can be found at Laws of Minnesota 1996, Chapter 462. The Department maintains that Minn. Stat. § 103G.005, subd. 19 specifically defines "wetlands" for purposes of the WCA, as not including public waters wetlands:

Subd. 19. Wetlands. (a) "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

- (1) have a predominance of hydric soils;
- (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances support a prevalence of such vegetation.

(b) Wetland does not include public waters wetlands as defined in subdivision 18.

(Emphasis added)

The Department's analysis is correct. There is no impact in this case as a result of recent changes to the WCA because the wetland which is the subject of the permit application is a public waters wetland as defined in Minn. Stat § 103G.005, Subd. 18.

The Department has provided a copy of the District Court's ruling in the McLeod County case. As set out in the Court's Order, dated August 4, 1995, the issue related to a drainage authority clearing a lateral of a judicial ditch to its original condition, and the Department's actions in requiring the drainage authority to cease and desist due to the impact on another public water. There is no indication that the District Court even considered whether the existence of a judicial ditch conferred any right upon a private landowner to perform construction work in a public waters wetland. Applicant's proposal is not to maintain, clean or reconstruct a drainage ditch; it is to construct a roadway in a public waters wetland through which a drainage ditch happens to traverse. There is no reason to reconsider this matter based on the McLeod County matter.

Applicant has submitted letters from the Hubbard County Auditor and the Hubbard County Recorder indicating that neither can find the 1984 judgment of the Hubbard County Hearings Unit that established the public waters inventory or the inventory as determined by the Department. Applicant does not explain why this absence of public records requires that the earlier Partial Summary Disposition Order be reconsidered. The Department opined that the only possible claim would be lack of notice to the Applicant that the land was a public waters wetland. A lack of notice claim in this case was constructively waived by Applicant when he made his initial application for a permit to perform work in public waters wetland 29-320W. Applicant has failed to establish the relevance of the missing records; nor has there been any showing by Applicant that he has been prejudiced in any material way by the absence of these records. Accordingly, the reconsideration request made on that ground must be denied.

The last basis cited by Applicant for reconsideration is that the OHWL of the wetland is below the level of the proposed construction site as identified in the amended permit application. As mentioned in the March 14, 1996 Order, the Department has acknowledged that the issue of the OHWL of wetland 29-320W is an appropriate issue to be addressed in the contested case hearing. The Partial Summary Disposition Order did not extend to the issue of the OHWL of the wetland and therefore, the Order cannot be reconsidered on that basis.

Applicant has identified no basis for altering the Partial Summary Disposition Order dated March 14, 1996. A contested case hearing on the issue of OHWL of Wetland 29-320W will take place as scheduled on September 10, 11 and 12, 1996. A prehearing conference by telephone will take place on August 21, 1996. The request for reconsideration must be DENIED.

P.A.R.